IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

MOTION TO DISMISS APPEAL

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases:

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MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, the Appellee-Commissioner of Agriculture and Markets moves the Court to dismiss the appeal herein on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

I

The State Statute Involved and the Nature of the Case

A. The Statute

This appeal raises the question of the validity of certain provisions of Section 258-c of the Agriculture and Markets Law of the State of New York dealing with the licensing of milk dealers (Chapter 126, Laws of New York, 1934, as amended).

This case deals with the sale of pasteurized, processed milk in consumer-size containers by a milk dealer to a chain of supermarket stores. The New York law creates a presumption in favor of the grant of a milk dealer's license, or an extension thereof. The statute prohibits the denial of a milk dealer's license, except where the Commissioner of Agriculture and Markets "finds by a preponderance of evidence, after due notice and opportunity of hearing to the applicant or licensee, one or more of the following: . . . (2) that the issuance of the license will tend to a destructive competition in a market already adequately served; or (3) that the issuance of the license is not in the public interest" (Subdivisions 2 and 3 of Agriculture and Markets Law § 258-c).

B. Statement

The appellant, Tuscan Dairy Farms, Inc. (hereinafter "Appellant" or "Tuscan"), which has been licensed to conduct business as a milk dealer in New York for approximately 20 years, filed an application on May 28, 1975, for an extension of its license authorization (A19, A34, 29a, 30a)*. Tuscan

* Numbers in parentheses preceded by "A" refer to pages of the Record on Appeal in the Court of Appeals. Numbers in parentheses followed by "a" refer to pages of the appendices contained in Appellant's jurisdictional statement.

sought to sell and distribute milk in consumer-size containers at wholesale in Richmond County with a primary interest in a chain of supermarkets (A34, A37).

On July 13, 1975, a hearing was held to consider Appellant's application, pursuant to Agriculture and Markets Law § 258-c (29a). The record included evidence that: service was available to all sizes and types of wholesale customers, and a full line of products were offered through existing dealers (A79, A86, A92, A99, A106, A115, A134, A137, A145); the largest-volume distributor in the county had closed its processing plant a few months previous to the hearing because volume was insufficient for efficient plant operation (A121); a large milk dealer licensed to serve Richmond County in March, 1975, had been able to develop but one route with only 23 customers (A134 and A138); the wholesale business for one dealer had declined 50 percent over the preceding two years due to price competition (A87); another dealer's business had declined one-third due to price competition (A99); one dealer's total volume had not increased over the preceding 1½ years, despite extensive advertising (A93-A94); and that present licensees had difficulty meeting prices of stores using milk as a loss-lender (A113, A151-A152, A123-A125). The Appellant produced no countervailing evidence in response to testimony by several witnesses familiar with the Richmond County market indicating the intense competition in that market (A74-A165).

Based on the record, the Appellee-Commissioner found that existing licensees were providing adequate service to the market (36a). The Commissioner also found that under the conditions then existing in Richmond County, the entry of the applicant, with a primary interest in serving large supermarket accounts, would tend to a destructive competition for sales of milk, resulting in a destructive impact on small and medium-volume dealers who serve small wholesale accounts

and make home deliveries (37a). The Commissioner further concluded that the public interest in having a balanced milk distribution structure to meet the milk needs of the county would not be served by extending Appellant's license (38a). The Commissioner denied the Appellant's application on the foregoing statutory grounds (38a).

C. Proceedings Below

The Appellant commenced a proceeding, pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York, to annul the Commissioner's Determination on the grounds that it was not supported by a preponderance of evidence and the Commissioner's application of § 258-c of the Agriculture and Markets Law was in violation of the Commerce Clause of the United States Constitution.

Appellant originally alleged that the Commissioner's Determination "was based in whole or part" on the fact that Appellant is not a New York resident, and for such reason Agriculture and Markets Law § 258-c is in violation of the Commerce Clause (A22-A23). Following extensive examination of records of the Department of Agriculture and Markets, *Appellant abandoned its claim that the denial of its application was based upon discrimination against a non-resident* (P. 4 of Appellant's Brief in the Court of Appeals).

The Appellate Division, Third Department, of the Supreme Court of the State of New York, by decision dated August 4, 1977, held that the Commissioner's Determination was supported by a preponderance of evidence, and that the Commissioner's application of Section 258-c of the Agriculture and Markets Law did not violate the Commerce Clause of the United States Constitution (24a-28a). Upon appeal to the New York State Court of Appeals, the judgment of the Appellate Division was affirmed (1a-22a).

II

Question Presented

Does the Commerce Clause of the United States Constitution preclude the State of New York from regulating the sale of processed milk in consumer-size containers by a New York licensee to a chain of New York supermarkets where the State has found that such sales would impair balanced service to the public?

III

ARGUMENT

The appeal herein fails to present a substantial federal question and therefore should be dismissed.

There is no substantial doubt as to the constitutional validity of the denial of an extension of a New York milk dealer's license to sell and distribute consumer size packaged milk in a county within New York, on the grounds that the granting of such an extension would tend to a destructive competition in a market already adequately served and would not be in the public interest. The opinion of the New York Court of Appeals, which confirmed the appellee-Commissioner's Determination denying Appellant an extension of its New York license upon such grounds, is fully consistent with the opinions of this Court.

The validity of a state's economic regulation of a local milk industry, including the licensing of milk dealers engaged exclusively in interstate commerce, has long been established by this Court. *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346 (1939). The Court recognized that, although Eisenberg was engaged exclusively in interstate commerce, its purchase of milk in Pennsylvania was essentially of a "local" nature and could be constitutionally regulated. 306 U.S. at

352. Similarly, the State of New York may validly regulate the essentially local activity of selling processed, packaged milk in New York although interstate commerce may be incidentally affected.

The Court's continuing approval of the state's power to regulate out-of-state milk dealers was demonstrated in *State v. Pure Vac Dairy Products Corp.*, 251 Miss. 457, 170 So. 2d 274 (Miss. 1964), app. dismissed for want of a substantial federal question, *Pure Vac Dairy Products Corp. v. Mississippi, ex rel. Patterson*, 382 U.S. 14 (1965). In *Pure Vac* it was recognized that the Mississippi milk price regulations concerned peculiarly local interests, and the application of these regulations to milk shipped by a Tennessee corporation to customers in Mississippi was upheld. 170 So. 2d at 278-279.

A state's economic regulation of the milk industry was again affirmed in *United Dairy Farmers Corp. v. Milk Control Comm.*, 335 F. Supp. 1008 (M.D. Penn. 1971), Aff'd. 404 U.S. 930 (1971), against claims that such regulation effected an impermissible burden on interstate commerce. 335 F. Supp. at 1014.

Contrary to Appellant's contentions (Juris. State. pp. 15-16), the case of *Schwegmann Bros. Giant Supermarkets v. Louisiana Milk Comm.*, 365 F. Supp. 1144 (M.D. Louisiana 1973), Aff'd. 416 U.S. 922 (1974), is further confirmation that a state may validly regulate the sale of milk even though the product originated outside the state, and interstate commerce is in some manner affected. As in *Eisenberg*, the Court held that regulation of the in-state aspect of a transaction did not constitute a burden on interstate commerce, even though the product originates outside the state where it is ultimately sold. 365 F. Supp. at 1156. It was only when Louisiana attempted to project its legislation outside its borders by controlling the price to be paid for milk in a sister state that its action was invalidated. *Id.* There has been no such extraterritorial purpose or effect in the matter now before the Court. The aim and effect of New York's action was regulation of the sale and distribution of consumer-size containers of milk within New York, a legitimate exercise of the State's police power, having a negligible, if any, effect upon interstate commerce.

In considering the most recent case before it dealing with state regulation of the milk distribution industry, this Court reaffirmed a state's broad power to legislate protection where local interests are concerned, even though interstate commerce may be affected in some manner. *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). When such local concerns overlap with the national interest, the court held that the rule enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1942), must be applied to determine whether an exercise of the state police powers violates the Commerce Clause:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . ." 424 U.S. at 371-72.

In *Cottrell*, a permit to distribute in Mississippi milk products processed in Louisiana was denied solely on the basis that there was no reciprocity agreement between the two states. 424 U.S. at 370. There, the state regulation was found to violate the Commerce Clause, but it is clear that such finding was based on the fact that the statute's purpose and result were to absolutely foreclose Louisiana from exporting its goods to Mississippi, unless it entered into a reciprocity agreement. 424 U.S. at 380. A state "may not use the threat of economic isolation as a weapon to force sister states to enter into even a desirable reciprocity agreement." 424 U.S. at 366.

The total exclusion of foreign products and the devastating effect on a sister state found in *Cottrell* is not present in the circumstance of the case now before the Court. The application by the Court of Appeals of the balancing test and its confirmation of the Commissioner's Determination under that test, is fully in accord with the opinions of this Court.

That the economic regulation of the New York dairy industry is a legitimate exercise of a state by its police power is not even open to controversy. See *Nebbia v. New York*, 291 U.S. 502 (1934) and *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 529 (1949). The Court of Appeals properly concluded that the challenged regulation, which helps to maintain a balanced, packaged milk distribution structure necessary to serve the milk needs of the consuming public, meets the *Pike* requirement that the regulation be for the effectuation of "a legitimate local public interest" (12a).

The evenhandedness of the statute, as well as its application herein, is also clear. That the statutory standards for determining whether a license should be denied are applied to interstate and out-of-state dealers alike is not even in question. In this regard, it should be noted that the appellant originally alleged that its license was denied based on its out-of-state residency (A22-A23). However, this claim was abandoned following an extensive examination of Department records by appellant's attorneys.* (Appellant's Court of Appeals' Brief,

* During 1976 and 1977, the appellant requested and was provided with voluminous material and information by the Department, including the names and places of business of out-of-state milk dealers licensed to sell consumer-sized packaged milk in New York; a list of foreign corporations' milk plants located in New York; a list of foreign corporations' milk plants located in New York; a list of counties in which out-of-state dealers are licensed and the terms of each such dealer's license, and the dates the licenses were issued; the names of all dealers whose licenses were denied or limited because they did not provide balanced service, and copies of the

(Footnote continued on following page)

p. 4.) Of course, appellant itself has been licensed as a milk dealer in New York for over 20 years (A19), and its volume of distribution in two New York counties is substantial (A37 and A250).

Finally, under the balancing test applied in *Cottrell*, New York's interest in preventing destructive competition and maintaining a balanced milk distribution system must be weighed against any effect on the flow of commerce.

The state's interest in preventing a tendency toward destructive competition is very great. Destructive competition among the processors and distributors of packaged fluid milk can drive efficient, medium-sized and smaller dealers out of business and soon reduce the number of distributors in a market to the point where effective competition is greatly impaired or eliminated. Destructive competition, while in process as well as in its final result, impairs the range of services and product available to small accounts. Independent grocery stores, small schools, hospitals, nursing homes, and home delivery customers lose available services in the competitive struggle between competitors to capture and hold high-volume, low-unit cost accounts. It is thus apparent, as properly concluded by the Court of Appeals, that a milk distribution structure to adequately meet the needs of the consuming public serves an important legitimate public interest.

The appellant's interest was in having its New York milk dealer's license further extended to authorize it to sell and

(Footnote continued from preceding page)

Determinations on such applications; a monthly summary of license actions taken since 1951; a list of all applications for milk dealer licenses or extensions filed between 1972 and 1975, and since 1960, with respect to the New York Metropolitan Area; copies of Determinations, Hearing Officer's Reports, and transcripts relating to applications; all statements of policy or interpretation prepared prior to 1976. Appellant also requested, and received, copies of approximately 600 pages of Department documents.

distribute packaged milk to chain stores in another county of New York. The denial of appellant's application for such additional license authorization, with a negligible, if any, effect on interstate commerce does not counterbalance New York's substantial interest in maintaining effective competition in milk sales and a balanced milk distribution structure.

The ". . . Commerce Clause was not written to let one particular dealer's interests destroy a state's orderly marketing system." *Hood, supra,* 336 U.S. at 559 (Black, J., dissenting). Although the effect upon one interstate dealer of the denial of its application might be to preclude its particular sales, this certainly does not amount to a prohibition of the sales of goods in interstate commerce as claimed by appellant (Jur. State. p. 10). Thus, in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission,* 341 U.S. 329 (1951), a case which upheld a state's regulation of the sale and distribution of gas to local customers by one engaged in interstate commerce, this Court declared:

> "Although the end result might be prohibition of particular direct sales, to require appellant to secure a certificate of public convenience and necessity before it may enter a municipality already served by a public utility is regulation, not absolute prohibition."

Of course, implicit in requiring an application for such certificate is recognition of the state's power to deny that application if it finds that the public interest will not be served.

The Court of Appeals correctly concluded that, in balancing these interests, the scales tip in favor of the State's interest which is at stake when compared to any minute effect on the flow of commerce that may occur by the denial of the license extension sought by appellant (15a).

Appellant's reliance upon *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), and *H.P. Hood & Sons v. Du Mond, supra,* to

support its position is ill-founded. The circumstances of this case do not involve the prohibition of milk sales in interstate commerce for the protection of local economic interests, despite such mischaracterization by appellant. Appellant's repeated claims of exclusion, discrimination, and protectionism were fully considered by the Court of Appeals, and properly found to be without merit (13a). Thus, the objectives or effects of the State actions invalidated in *Baldwin* and *Hood* are not present in the matter before the Court.

The provision declared invalid in *Baldwin* prohibited the sale of milk imported from neighboring states, unless the price paid to the out-of-state farmers was at least equal to that paid New York producers. In *Eisenberg, supra,* this Court characterized it decision in *Baldwin* by its statement that in that case the court:

> "condemned an enactment *aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state.* . .[T]he attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state" 306 U.S. at 353. (emphasis added)

The statute herein makes no discrimination between domestic and foreign applicants or between domestic and foreign products. Furthermore, unlike *Baldwin,* there is no attempt to affect or regulate in any way the market structure of a foreign market.

In the *Hood* case, a Massachusetts corporation applied for a license to construct in Greenwich, New York, a milk receiving depot for the shipment of raw milk to Boston, which was dependent upon milk imported from other states for 90 percent of its consumption. 336 U.S. at 526. Relying on Section 258-c of the Agriculture and Markets Law, the Commissioner of Agriculture and Markets denied the application because diversion of the raw milk supply might have had "a tendency to deprive such [local] markets of a supply needed during the

short season." 336 U.S. at 529. Thus, a statute neutral on its face was applied in a patently discriminatory manner designed to favor a local milk industry. This Court invalidated that determination which it found to be "for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests." 336 U.S. at 530.

In decisions subsequent to *Hood*, this Court has continued to explain *Hood* as a case involving discrimination against an out-of-state dealer. Thus, in upholding a state's power to fix prices on natural gas produced in its fields, although 90 percent of the production was transported out of state for consumption, the *Hood* decision was described as follows:

> "The vice of the regulation invalidated by *Hood* was solely that it denied facilities to a company in interstate commerce *on the articulated ground that such facilities would divert milk supplies needed by local customers; in other words, the regulation discriminated against interstate commerce." Cities Services Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 188 (1950). (emphasis added)

The Court again explained *Hood* as a case involving "an avowed purpose to discriminate against interstate goods" in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). The ordinance before the Court excluded absolutely all milk that had not been produced within a radius of five miles of Madison. The appellant labels the Madison ordinance as an economic protectionist measure which did not discriminate against interstate commerce (Jur. State., pp. 17, 18). However, this Court, in fact, invalidated the regulation on the ground that it "plainly discriminate[d] against interstate commerce." 340 U.S. at 354. Furthermore, even though the ordinance discriminated against foreign milk, this Court, before invalidating the statute, still considered whether, and found that, "reasonable non-discriminatory alternatives

adequate to conserve the legitimate local interest [were] available." 340 U.S. at 354.

Although there was no such discriminatory intent or effect in the present case, the Court of Appeals still applied the final prong of the balancing test articulated in *Cottrell*, and considered whether the local interest "could be promoted as well with a lesser impact on interstate activities" (15a, 16a, citing *Cottrell, supra*, 424 U.S. at 372). The Court correctly concluded that the procedure used to promote the state's legitimate local interest passes this least-restrictive, alternative test (16a).

Again, in *Breard v. Alexandria*, 341 U.S. 622 (1951), the Court said:

> "Likewise in *Hood & Sons v. Du Mond*, it was the *discrimination against out-of-state dealers* that invalidated the order refusing a license to buy milk to an out-of-state distributor" 341 U.S. at 637. (emphasis added)

Referring to *Eisenberg*, the Court added:

> "Where no discrimination existed, in a somewhat similar situation, we upheld the state regulation as a permissible burden on commerce." *Id.*

In *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, supra*, this Court characterized its decision in *Hood* as a case "where a state was said to have discriminated against interstate commerce by prohibiting it because it would subject local business to competition." 341 U.S. at 337. The Court also noted that the Michigan statute did "not distinguish between an interstate or intrastate agency desiring to operate in a locality." *Id.* In upholding the statute which prohibited Panhandle from selling natural gas which it transported by pipeline from Texas to industrial customers in Michigan without having a certificate of convenience and necessity, this Court stated:

> "[t]he sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution. In the absence of federal regulation, state regulation is required in the public interest. These principles apply to direct sales for industrial consumption as well as to sales for domestic and commercial uses." 341 U.S. at 333 (citations omitted)

It is readily apparent that the Court's holding in *Hood* was limited to a narrow basis and does not bar a state's regulation of local milk sales, although interstate commerce may be incidentally affected. Thus, although the Commissioner's Determination herein was issued pursuant to the same provision of law (amended) as the Determination in *Hood*, the cases are plainly distinguishable, as fully demonstrated in the decision of the Court of Appeals (10a-18a).

Appellant's reliance upon *City of Philadelphia v. New Jersey*, ... U.S. ...., 46 USLW 4801 (June 23, 1978), is also misplaced. In fact, the Court of Appeals' decision herein is fully in accord with this Court's holding in that recently-decided case. The statute declared invalid in *City of Philadelphia* prohibited the importation of most wastes originating in or collected outside New Jersey in an attempt to conserve the State's remaining landfill space. Thus, the New Jersey statute, on its face, was similar to the effects of the Determination in *Hood* in that it invidiously discriminated against those outside the State in order to protect local interests at the expense of sister states.

While state action which excludes or blocks commerce at its border to effect economic isolation and protectionism, as in *Hood*, *Baldwin*, and *City of Philadelphia*, may be invalid *per se*, the balancing test relied on in *Cottrell* is to be applied where, as here, regulation directed at legitimate local concerns is involved. 46 USLW at 4803. In this regard, it was not New Jersey's efforts to protect its citizens' environment or their pocketbooks which invalidated the statute in *City of Philadelphia*, but rather the statute's violation of the principle of non-discrimination in "block[ing] the importation of waste in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites." 46 USLW at 4804 and 4805. As properly concluded by the Court of Appeals, the determination made pursuant to the statute involved herein was not in pursuit of discrimination against or exclusion of competition from outside the state, nor was it for the protection of a local industry (13a).

IV

Conclusion

For the foregoing reasons, this appeal should be dismissed.

Dated: Albany, New York
November 6, 1978

Respectfully submitted,

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